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In the Supreme Court of the United States

GOLDEN BRIDGE TECHNOLOGIES INC.,
PETITIONER,

v.

MOTOROLA INC.; ERICSSON INC.; QUALCOMM INCORPORATED; AND LUCENT TECHNOLOGIES INC.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, as the Fifth Circuit Court of Appeals and district court held, summary judgment in favor of Respondents was warranted because Petitioner failed to present evidence creating a genuine issue of material fact as to the existence of the alleged conspiracy among certain members of the Third Generation Partnership Project, a standard-setting organization, to remove Petitioner's technology from a wireless telecommunications standard.

PARTIES TO THE CASE AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondents, Motorola Inc. ("Motorola") and Qualcomm Incorporated ("Qualcomm"), are publicly traded companies with no parent companies. No publicly held company owns more than 10% of the stock of Motorola or Qualcomm. LM Ericsson Telefonaktiebolaget is a publicly traded company that owns more than 10% of the stock of Respondent Ericsson Inc. ("Ericsson"). Alcatel-Lucent is a publicly traded company that owns more than 10% of the stock of Respondent Lucent Technologies Inc. ("Lucent").

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OPINIONS BELOW

The court of appeals' opinion is reported at 547 F.3d 266 and reprinted in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a-11a. The opinion of the district court is unreported, and reprinted at Pet. App. 12a-31a.

JURISDICTION

The court of appeals' judgment was entered on October 23, 2008. The Petition for Writ of Certiorari ("Petition") was filed on January 21, 2009, and placed on the docket on February 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. § 1, provides in relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . illegal."

COUNTERSTATEMENT OF THE CASE

A. Introduction

This case does not present the legal issue Petitioner has asked this Court to review. Petitioner never made any argument below based on or related to the Third Circuit's opinion in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), the D.C. Circuit's opinion in *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, --- U.S. ---, No. 08-694, 2009 WL 425102 (Feb. 23, 2009) or, more generically, about deceptive conduct in standard setting organizations. Indeed, Petitioner's "Question Presented" about the antitrust

significance of "deceptive" conduct was not raised below and thus is not properly before this Court. This case is from a legal perspective mundane: Petitioner advanced below a garden-variety conspiracy theory about a group of companies that supposedly conspired outside the rules of a standard setting organization to convince the organization to stop supporting Petitioner's technology. That claim was rejected by the district court and court of appeals because there was no credible evidence of conspiracy. The Fifth Circuit avoided all of the legal issues before it because the absence of any triable evidence of the alleged conspiracy rendered them all moot. There is no reason for a third court to review these facts, least of all this Court.

B. Factual Background

The dispute in this case centers on the removal of a technical specification for a technology called Common Packet Channel ("CPCH") from the third generation ("3G") wireless telecommunications standard established by the Third Generation Partnership Project ("3GPP"), a formal standard-setting body. Petitioner, Golden Bridge Technology ("GBT"), filed suit against a handful of the more than 250 companies belonging to 3GPP, alleging that these companies conspired to remove CPCH technology from the 3GPP standard in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Four companies remain in the litigation: Motorola Inc. ("Motorola"), Ericsson Inc. ("Ericsson"), Qualcomm Incorporated ("Qualcomm") and Lucent Technologies Inc. ("Lucent").

* * *

3GPP is a non-profit standard-setting organization that institutes uniform technology standards for 3G cellular phones and systems, to allow the numerous necessary components of cellular communications systems to interoperate. Pet. App. 2a, 10a. The rulings below ably describe the manner in which 3GPP sets technology standards. Pet. App. 2a-3a, 13a-15a. For purposes of addressing Petitioner's arguments for certiorari, two aspects of the standard-setting process bear special attention.

First, there are over 250 member companies in 3GPP, representing every level of the cellular telephone industry, and those member companies collaborate and assume joint responsibility for making technical contributions and proposals regarding what should (and should not) be in the standard. Pet. App. 2a. As is the norm in many standard setting organizations, informal collaboration, small group discussions, and email communications among 3GPP members are encouraged because that is how 3GPP does most of its work. Pet. App. 10a. In the words of the court of appeals, "[Respondents] presented evidence showing that these informal communications are an important part of the standard setting process." *Id.* Such informal collaborations often result in "joint contributions" to 3GPP—proposals by multiple members of 3GPP to include technology in or remove technology from the standard.

Second, as a safeguard against the possibility that a small group of companies might subvert the standard-setting process, 3GPP meetings are open to all members and 3GPP makes standard-setting decisions through consensus and, if consensus cannot be reached, supermajority voting. Pet. App. 3a. The sustained

opposition of even a single 3GPP member to a proposal to change the 3GPP standard will prevent consensus and force a vote. *Id.* In such a case, a vote of all individual members present at a formal 3GPP meeting is held with each member having one vote. *Id.* A 71% supermajority must vote in favor of the change for it to be adopted. *Id.*

Petitioner developed CPCH, a technology that allows the transmittal of data packets between a cellular phone and a wireless network. Pet. App. 2a-3a. In 1999, 3GPP adopted CPCH as an "Optional Feature" in its standard. Pet. App. 3a. CPCH's "optional" status meant that cellular equipment manufacturers were not required to use the technology, but if they chose to use CPCH, they had to implement it according to the applicable 3GPP specifications to be in compliance with the standard. *Id.* From 1999 through 2004, Petitioner could and did try to convince industry members to adopt CPCH, but no one was obligated to do so. Pet. App. 3a, 15a-16a. In fact, not one company in the wireless communications industry—anywhere in the world—implemented CPCH during this five-year period. *See id.* Thus, by the time events relevant to Petitioner's conspiracy claim commenced, the market had decided CPCH's fate.

In 2004, at a 3GPP plenary meeting, several members proposed improving the 3GPP standard by "cleaning-up" the specifications, *i.e.*, removing obsolete and unused technologies. Pet. App. 3a. Petitioner was not in attendance; it had significantly curtailed its business operations by that time, and had long ago stopped attending 3GPP meetings. Pet. App. 3a-4a, 16a. Following the proposal, a "Feature Clean-Up" process began in earnest. Pet. App. 3a-4a. In

February 2005, during a 3GPP working group meeting, Nokia and Motorola presented a draft feature clean-up list that included eight technologies that might be removed from the standard. Pet. App. 3a, 16a. CPCH was not included in this initial feature clean-up list. Pet. App. 3a. Action on the proposed clean-up list was deferred to the next plenary meeting, which was scheduled to take place a month later in Tokyo, Japan. Pet. App. 3a-4a, 16a.

Discussions related to feature clean-up continued in the month between the February working group meeting and the March plenary meeting. The medium was email exchanges, in which 3GPP members debated the technical merits of technologies proposed for removal from the standard. Pet. App. 3a-4a. Nokia circulated an email to several companies with a draft list of technologies to be considered for a joint feature clean-up proposal. Pet. App. 4a, 16a. That email was sent to many companies not named as defendants in this case, and to Respondents Motorola, Ericsson, and Qualcomm. Pet. App. 4a. It was not sent to Respondent Lucent. *Id.* Several companies replied to Nokia's email, suggesting possible additions to the clean-up list. Pet. App. 4a, 23a-25a. It was in this context that NTT DoCoMo (a Japanese mobile telephone operator) proposed adding CPCH to the clean-up list because there was no commercial interest in it. *See* Pet. App. 4a, 23a-24a. Not all companies agreed with NTT DoCoMo's proposal, however. *See id.* Ultimately, because Nokia was concerned that the inclusion of CPCH might prevent reaching consensus as to feature clean-up generally, CPCH was not included in the joint contribution. Pet. App. 4a, 24a.

In March 2005, the Tokyo plenary meeting was held. Pet. App. 4a, 16a. Again Petitioner was not in attendance. *Id.* On the first day of the meeting, Nokia presented the joint proposal on feature clean-up, which did not include CPCH. Pet. App. 4a. Then, during the formal plenary session, an Ericsson representative acting independently stood up at an open microphone in front of all of the assembled members of 3GPP and suggested adding CPCH to the clean-up list. Pet. App. 9a, 25a. None of the 3GPP members in attendance objected to Ericsson's suggestion. Pet. App. 4a. Even the representative from Cingular Inc., the 3GPP member that had historically been most supportive of CPCH, supported its removal from the standard. Pet. App. 16a-17a. It was thus through consensus at a formal 3GPP meeting that CPCH was added to the feature clean-up list. Pet. App. 8a, 18a. A revised joint contribution including CPCH was thereafter approved by all 3GPP members in attendance at the Tokyo plenary meeting. Pet. App. 4a.

The approval of the revised clean-up list at the Tokyo plenary meeting did not remove CPCH from the 3GPP specification: there needed to be a formal vote at the *next* plenary meeting, scheduled for June 2005 in Quebec, Canada. Pet. App. 4a, 17a-18a. Petitioner learned of the proposal to remove CPCH in the interim and filed this lawsuit before the Quebec meeting. Pet. App. 4a-5a. Petitioner did not attend the Quebec plenary meeting at which the formal vote on the proposal to remove CPCH was taken. Pet. App. 4a. Without opposition, the request to remove CPCH from the 3GPP standard received final unanimous approval from the 3GPP members in attendance. Pet. App. 4a, 18a.

C. District Court Proceedings

The decisions below rest entirely on a failure of proof as to the element of conspiracy. Before the district court, Petitioner did not allege a conspiracy of the standard setting organization itself. Instead, it alleged a kind of "*ultra vires*" conspiracy that took place outside of formal 3GPP meetings. The claim evolved over time. At first, GBT's counsel represented to the district court that the decision to remove CPCH from the 3GPP standard was made outside the normal standard-setting process and that "'these Defendants acted in the ... proverbial smoke-filled room.'" Respondents' Fifth Cir. Br. 3 (filed Jan. 23, 2008) (citation omitted) (omission in original). Then Petitioner learned that CPCH was put on the feature clean-up list as a result of a proposal made to, and action taken at, a formal 3GPP meeting. Petitioner adapted its claim, and thereafter argued that Respondents and a few others acted *in advance of the plenary meeting* to orchestrate CPCH's removal. Pet. App. 18a, 22a. Petitioner claimed this conspiracy was established by email communications. Pet. App. 24a-25a.

Respondents jointly moved for summary judgment on the ground that there was no triable issue of conspiracy. Pet. App. 12a, 18a. The district court granted Respondents' motion, holding that "[t]here [was] no evidence of a common scheme among [Respondents]." Pet. App. 27a. In particular, the district court noted that the emails which Petitioner relied on in support of its argument that Respondents "'orchestrat[ed] ... a plan'" and engaged in "'illicit exchanges'" to "'escape detection'" did not establish any conspiracy. Pet. App. 24a-25a (citation omitted).

To the contrary, the district court found that the emails demonstrated "disagreement" among the Respondents. Pet. App. 25a. Further, the district court's review of the evidence confirmed that "[Respondents] participated in the legitimate goal of simplifying the 3GPP standard," and that this "conduct merely reflect[ed] a standard-setting organization at work." Pet. App. 27a, 30a. The district court concluded that "[Petitioner's] evidence fail[ed] to show a conspiracy among [Respondents], and summary judgment [was] warranted on this ground." Pet. App. 27a.

D. Fifth Circuit Proceedings

Petitioner argued before the Fifth Circuit that the district court erred in granting summary judgment in favor of Respondents because the "email communications between the [Respondents] and others following the Scottsdale meeting show[ed] a conspiracy, in the form of a group boycott, to eliminate CPCH from the 3GPP standard." Pet. App. 7a. The Fifth Circuit disagreed, and affirmed the district court's holding that Petitioner failed to raise a genuine issue of material fact supporting its allegation that Respondents conspired to add CPCH to the feature clean-up list. *Id.*

Like the district court judge, the three-judge panel found that the record revealed "disagreement" among the companies as to the features to be included in the clean-up list, not collusion. Pet. App. 8a. Unable to find any evidence in the record supporting Petitioner's claim of a conspiracy, and acknowledging "informal communications [as] an important part of the standard setting process," the Fifth Circuit concluded that the evidence amounted to no more than "an exchange of

information, followed by parallel conduct when the [Respondents] (and over 100 other companies) unanimously voted to remove CPCH." Pet. App. 8a, 10a. "As [Petitioner] ha[d] not met the threshold requirement of demonstrating the existence of an agreement in restraint of trade," the Fifth Circuit affirmed the district court's grant of summary judgment. Pet. App. 11a.

The Fifth Circuit did not address any of the genuinely legal issues before it, for example whether the district court erred in holding that the alleged conspiracy, had it been proven, would be *per se* illegal. Pet. App. 11a & n.2. Judge Garza, writing for the court, said: "As GBT has not met the threshold requirement of demonstrating the existence of an agreement in restraint of trade, we need not review the district court's findings as to the remaining requirements of a § 1 violation." Pet. App. 11a. In other words, the decision below rests entirely on a failure of proof as to the alleged *ultra vires* conspiracy.

REASONS FOR DENYING THE PETITION

The Petition is not worthy of this Court's review because the case does not actually present the legal issue that Petitioner contends warrants review. In reality, the case was decided on the facts and dismissed on account of a failure of proof.

The Fifth Circuit decided only one issue below: whether there was evidence in the record tending to establish a genuine issue of material fact as to the existence of the alleged conspiracy to remove CPCH from the 3GPP standard. Pet. App. 2a. Based upon a considered review of the record, the Fifth Circuit concluded—as had the district court—that there was a

failure of proof as to the existence of a conspiracy. Pet. App. 11a, 18a. There is absolutely nothing remarkable about the Fifth Circuit's application of the well-settled summary judgment standard to the particular facts of this case. Pet. 7-8. Petitioner does not seriously argue otherwise.

The Fifth Circuit had no occasion to consider, much less decide, Petitioner's Question Presented about "deceptive conduct" in standard setting organizations. Cases such as *Broadcom* and *Rambus* are about the antitrust consequences of (a) a single firm (b) allegedly making intentional misrepresentations to a standard setting organization about (c) the firm's patent portfolio or patent licensing practices. But that issue neither was, nor could have been, raised below. Petitioner has always and only complained about conspiracy, not unilateral deceptive conduct of the sort challenged in *Broadcom* and *Rambus*.

Petitioner would have this Court believe that the "deceptive conduct" issue is presented here because "Respondents violated [the] 3GPP [procedural] mandates." Pet. 12. This both mischaracterizes and misrepresents the record. There is no claim in this case that Respondents violated any 3GPP disclosure rule, or deceived anyone about anything. That alone destroys the basis for the Petition, for without such a claim the Fifth Circuit's decision could not possibly conflict with *Broadcom*.

In fact, Petitioner advances a radical and very different theory, unrelated to *Broadcom* or *Rambus*, that whenever participants in standard setting organizations engage in any supposed "unsanctioned" communications—such as email exchanges that have

not been formally pre-approved—a jury should be allowed, or instructed, to infer an unlawful conspiracy.[1] The Fifth Circuit addressed that briefly, rejecting both the premise and the extraordinary conclusions of Petitioner's argument. As to the premise, the Fifth Circuit agreed with Respondents that in 3GPP "informal communications are an important part of the standard setting process" and indeed are encouraged. Pet. App. 10a-11a. In other words, Petitioner's claim that Respondents violated 3GPP procedural "mandates" is false. Given that, the Fifth Circuit declined to infer anything sinister from the mere fact of informal email communications. *Id.* That is a faithful application of this Court's teachings that conduct consistent with lawful competition cannot be used to infer unlawful conspiracy, *see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984), and thus presents no issue worthy of review. In any event, the only upshot of this decision was that the Fifth Circuit resolved this case by applying the well-established summary judgment standards concerning alleged antitrust conspiracies.

Needless to say, a case that does not actually present Petitioner's Question Presented—because the issue was never raised—would be an exceptionally poor vehicle for addressing that question. The decision below in no way signaled the Fifth Circuit's views with regard to deception as a way to subvert standard setting decisions; nor did it touch in the least on the

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[1] There is no evidence that 3GPP rules prohibit the kinds of email exchanges at issue in this case. Petitioner's argument, rejected by the district court and the Fifth Circuit, is that unless email exchanges are affirmatively authorized by 3GPP, they are unsanctioned and thus illegal.

questions raised in *Broadcom* and *Rambus*. This is a routine case of a record that fails to sustain Petitioner's allegations of a conspiracy. The Petition should be denied.

1. The sole Question Presented in the Petition is "[w]hether deceptive and joint conduct which violates mandates governing the consensus process of a standard setting organization results in antitrust liability where such conduct removes a member's product from the standard." Pet i. This is plainly an effort to relate this case to *Broadcom* and *Rambus*, and in particular to suggest a circuit-split in relation to *Broadcom*. But this case has to do with neither deception nor the monopolization theories in *Broadcom* and *Rambus*. Nothing remotely like that was ever raised below.

During the last twelve years, there have been several antitrust cases and extensive legal commentary about whether it violates antitrust law for a single firm participating in a standards setting organization to lie or deliberately conceal material information about its patent portfolio so that the standards setting organization will unwittingly adopt a standard that reads on the firm's patents. *See, e.g., In re Dell Computer Corp.*, 121 F.T.C. 616, 618 (1996); ABA Section of Antitrust Law, *Antitrust Law Developments* 290-92 (6th ed. 2007). *Broadcom* and *Rambus* are of that ilk. In *Rambus*, the Federal Trade Commission ("FTC") alleged that Rambus Inc. had violated Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 5 of the FTC Act, 15 U.S.C. § 45, by deliberately concealing material information about its patent portfolio from an industry group that established standards for memory chips. *In re Rambus, Inc.*, No. 9302, 2006 WL 2330117

(FTC Aug. 2, 2006), *rev'd sub nom. Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, No. 08-694, --- U.S. ---, 2009 WL 425102 (Feb. 23, 2009). Broadcom Corp. ("Broadcom") brought another such case against Qualcomm alleging that Qualcomm had deliberately deceived a standard setting organization about its intentions to license on so-called fair, reasonable and non-discriminatory ("FRAND") terms any of its patents that were technically necessary to implement a standard. *Broadcom Corp.*, 501 F.3d at 304. In *Broadcom Corp.*, the Third Circuit ruled that Broadcom's complaint stated a claim for monopolization. *Id.* at 315.

This case is entirely different. This is not a monopolization case at all, but rather a conspiracy case that failed for insufficient proof of the alleged *ultra vires* conspiracy. This case has nothing to do with deceptive conduct of the kind at issue in *Rambus* or *Broadcom*, where a single firm allegedly improves the market power in its patents by lying to a standard setting organization in order to convince the organization to adopt its patented technology as the standard. Petitioner never alleged that Respondents lied to 3GPP about anything; it alleged a "smoke-filled room" conspiracy to rig a vote. And far from being a case in which allegedly deceptive conduct is used to get one's patents "in" a standard, this case is about an effort to clean-up a standard by ridding it of technologies that no one wanted to use or was using. It is no wonder then that neither *Rambus*, *Broadcom* nor any other so-called "patent holdup" case was cited by Petitioner or considered by the courts below.

2. The only issue the Fifth Circuit decided was whether there was a triable issue as to conspiracy.

After citing the basic principles of Section 1 of the Sherman Act,[2] the Fifth Circuit summarized this case as follows:

> GBT argues that email communications between the [Respondents] and others following the Scottsdale meeting show a conspiracy, in the form of a group boycott, to eliminate CPCH from the 3GPP standard. The district court disagreed, granting summary judgment because GBT failed to present any evidence supporting the inference of a conspiracy. We agree.

Pet. App. 7a; *see also* Pet. App. 27a. Importantly, the Fifth Circuit expressly declined to address "the remaining requirements of a § 1 violation." Pet. App. 11a & n.2 (refusing to endorse any of the district court's rationale for granting summary judgment in favor of Respondents, other than its conclusion that Petitioner did not present sufficient evidence of a conspiracy to take to a jury). Thus, it did not consider even impliedly any issue other than Petitioner's failure to present a triable issue of material fact on conspiracy. Pet. App. 1a-11a.[3]

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[2] As outlined by the Fifth Circuit, "[t]o establish a § 1 violation, a plaintiff must prove that: (1) the defendants engaged in a conspiracy; (2) that restrained trade; (3) in the relevant market. *Once a plaintiff establishes that a conspiracy occurred*, whether it violates § 1 is determined by the application of either the *per se* rule or the rule of reason." Pet. App. 6a (emphasis added) (citations omitted).

[3] Petitioner agrees with this reading of the lower courts' decisions. It concedes that "[t]he [d]istrict [c]ourt found that

It follows that the only question properly reviewable in this Court—if it met the standards for a writ of certiorari—would be adequacy of the proffered evidence of conspiracy. Petitioner, however, identifies nothing novel or of general importance in either the district court's or the Fifth Circuit's holdings that the documentary evidence in this case does not support a reasonable inference of a conspiracy. The legal principles for assessing evidence of conspiracy in an antitrust case were settled over twenty years ago. *See Monsanto*, 465 U.S. at 768 ("The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."); *see generally Antitrust Law Developments* 965-75 (summarizing the substantial body of case law regarding the application of Federal Rule of Civil Procedure 56 standards to claims of concerted action). It is evident that these are the

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Respondents' conduct reflected a standard-setting organization at work and that ... [Petitioner] provided *no evidence* that Respondents had a conscious commitment to a common scheme designed to achieve an unlawful objective." Pet. 6-7 (emphasis added). Petitioner further concedes that, like the district court, "[t]he Fifth Circuit held that *none of the emails, or any other evidence presented*, showed an explicit understanding between the Respondents to collude and unlawfully eliminate CPCH from the standard." Pet. 7 (emphasis added).

standards applied below. *See* Pet. App. 8a (citing *Matsushita*). In fact, Petitioner concedes they were applied. Pet. 19.

Petitioner complains that the lower courts applied *Matsushita* and similar cases "without considering . . . the issue of antitrust harms that can result from the violation of [standards setting organization] rules designed to prevent collusion." *Id.* That is false. That this case arises in the standard setting context is plain, and Petitioner had every opportunity to make—and made—its argument that *ultra vires* forms of collusion could undermine legitimate standard setting activities. In fact, Petitioner convinced the district court to rule, when deciding Respondents' motion to dismiss, that if collusion had undermined the formal standard setting process, it would be *per se* illegal.[4] Pet. App. 27a, 44a. Petitioner's case failed on the facts, because the emails that allegedly prove the *ultra vires* conspiracy in reality prove that no consensus was reached on removing CPCH from the 3G standard until the issue came up during a formal, plenary session of 3GPP.

3. In the end, Petitioner tries to turn its conspiracy case into a *Broadcom*- and *Rambus*-style deception case by equating deception about patents, the particular concern in *Rambus* and *Broadcom*, with any kind of (alleged) standard setting rules violation. Contrary to well-established precedents establishing the minimum evidence necessary to support a claim of conspiracy, Petitioner boldly proclaims that all "conduct which undermines the consensus forming mandates of [a standards setting organization] must

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[4] The Fifth Circuit declined to endorse this view, but did not reject it either. Pet App. 11a n.2.

constitute a violation of the Sherman Act as a matter of law." Pet. 8. Petitioner even argues that any unsanctioned communication among standard setting organization participants should be viewed "as direct evidence of a conspiracy." Pet. 20.

There is no doubt that the Fifth Circuit was unimpressed by Petitioner's suspicious attitude about standard setting and its attempt to manufacture technical violations of formal communication protocols as a substitute for evidence of conspiracy. Judge Garza noted how courts have long-recognized the benefits to society from industry standard setting endeavors, Pet. App. 10a, and with respect to 3GPP he wrote: "The standards 3GPP sets allow the numerous necessary components of cellular communications to operate compatibly"—a plainly procompetitive object. *Id.* He also noted the record evidence that 3GPP *encouraged* informal communications, undermining the very premise of Petitioner's arguments. *Id.*[5]

That said, the only consequence of these observations about policy was to reinforce the application of the general rules of conspiracy established by *Matsushita* and its progeny. Pet. App. 10a-11a ("[W]e decline to infer conspiratorial action on the basis of limited circumstantial evidence, particularly where this evidence is at least as consistent with permissible competition, and with

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[5] The District Court similarly held: "GBT describes [Respondents'] 'orchestration of a plan' with '*illicit exchanges*' to 'escape detection' as evidence of a common scheme against GBT. But again, GBT provides only attorney argument and no evidence to support the allegations of a conspiracy by [Respondents]." Pet. App. 24a-25a (emphasis added) (citations omitted).

independent action, as with unlawful conspiracy."). The legal analysis upon which the case was decided is therefore entirely unremarkable. It simply came down to the evidence as to whether there was a conspiracy, the least substantial grounds there are for this Court to grant review. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("[This Court does] not grant a certiorari to review evidence and discuss specific facts."); *Texas v. Mead*, 465 U.S. 1041, 1042-43 (1984); *see also* S. Ct. R. 10.

Nothing in the Third Circuit's *Broadcom* decision suggests that conspiracy allegations in the context of standard setting deserve a special and less rigorous summary judgment standard. Indeed, *Broadcom*, a monopolization case, says nothing whatsoever about conspiracy, the issue in this case. It neither holds nor implies that any violation of standard setting organization rules "must constitute a violation of the Sherman Act as a matter of law." Pet. 8. *Broadcom* addresses one very specific thing: whether an allegation that a patent holder made an "intentionally false promise to license essential proprietary technology on FRAND terms" states a claim for monopolization. *Broadcom Corp.*, 501 F.3d at 314. The Third Circuit held it did, but not because all rules violations in the context of standard setting are suspect. Its analysis, whether or not this Court would accept it, was narrow and focused on the particular nature of a unilateral FRAND commitment or absence of such commitment, which the Third Circuit thought was "a key indicator of the cost of implementing a potential technology." *See id.* at 313.

Petitioner's attempt to bootstrap 3GPP's communication "mandates" into evidence of conspiracy

is entirely different. Email communications, unlike intentionally deceptive patent disclosures, are a routine part of the way that 3GPP, and for that matter every standard setting organization, does business between meetings. Without emails, the technical work of 3GPP, whose members span the globe, would grind to a halt. Moreover, that an email is "unauthorized" by itself says nothing about whether it evidences an unlawful conspiracy. The vast majority of emails exchanged by standard setting organization participants, authorized or not, are innocuous, and surely do not *require* a finding of unlawful conspiracy. Neither *Broadcom* nor any other case endorses this view. Indeed, they do not come within light years of addressing this issue.

4. To the extent Petitioner is truly advancing a *Broadcom*-style deception argument, it was never raised below and is therefore waived. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). Until Petitioner requested certiorari, this case had been about allegations that Respondents were subject to antitrust liability because they had engaged in a continually morphing *ultra vires* conspiracy, not deception. It is much too late for Petitioner to reinvent its case once again. This Court does not sit to consider an issue when the lower court has not so much as been asked to consider it. To the contrary, this Court's "traditional rule" precludes a grant of certiorari "when the question presented was not pressed or passed upon below," *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation

marks omitted), precisely because the Court "sits as a court of review," and not as a court of first impression, *Duignan v. United States*, 274 U.S. 195, 200 (1927).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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